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No. 848

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

HAL HALL AND SNOW BLACKBURN HALL,
Petitioners,

vs.

PAUL J. BLEISCH, ET AL.,
Respondents.

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE JUDGE OF SAID COURT:

Respondents Paul Bleisch and wife Liana Bleisch, appellees in the proceeding below, respectfully request that this petition for writ of certiorari be dismissed for want of jurisdiction, or in the alternative denied or refused, for the reasons set out in the per curiam Judgment and opinion rendered by the United States Court of Appeals for the Fifth Circuit, September 30, 1968. (See this opinion as set out verbatim in appendix A).

STATEMENT OF THE CASE

On July 9, 1965, Petitioner, Snow Blackburn Hall, drove her car from a cleaning and pressing shop parking area, and without taking any precautions or keeping a proper lookout drove directly onto a through highway and plowed into the Volkswagen being driven by Respondent Liana Bleisch causing it to slam into a concrete median and skid on its top for approximately 75 yards and strike a car owned by the Cole Chevrolet Company that was parked in front of Cole's place of business. Cole instituted suit in a State Court against Petitioners and Respondents as Co-Defendants, for *property damage to his vehicle only.* When the Bleisch Respondents received notice of the Cole suit for property damages only, as residents of California they notified their insurance carrier in California of the same, and the insurance carrier, by and through its attorneys hired in Midland, Texas, filed an answer in the state proceedings. Further, cross-claims for indemnity and contribution were filed in connection with the property damage claim only, by the Respondents' insurance carrier on their behalf, against Petitioners as Co-Defendants, and *not* as opposing parties.

All three insurance carriers and their attorneys without the knowledge of the Bleisch Respondents got together and split up the spoils on the Cole automobile damages only, and the first time the Bleisch Respondents knew of this action was when Petitioner Hall and their same set of attorneys filed their motion to dismiss in Federal Court on the alleged grounds of res adjudicata in the totally unrelated proceedings having to do with an agreed property settlement judgment only, had without their knowledge in State Court.

In fact, the record should reveal that although the Midland attorney for the Bleischs' insurance carrier requested that Petitioner Halls' attorney draw a dismissal without prejudice to the Bleischs' claim for personal injuries, this same set of attorneys who are now representing these Petitioners on this highly technical ground for appeal, did not do so, but instead made an attempt to dismiss with prejudice the Bleischs' claim for known serious and costly personal injuries at the same time the piddling property damage settlement was effected between the three insurance companies.

Respondents and their California personal attorney knew nothing of these alleged friendly State Court proceedings. They later employed present counsel to file their primary claim for personal injuries for the first time in the proper Federal Court on the basis of diversity of citizenship. The Coles were never made parties to this latter suit.

Petitioners are still alleging error in spite of the correct Fifth Circuit Opinion and Judgment, because the Trial Court would not dismiss this primary suit which has been properly tried in the Federal District Court, after all of these same allegations were properly overruled by the Court, on the apparent grounds they did not come into Federal Court with clean hands, and were trying to foster upon the Court the mistaken and mislabeled theory of "compulsory Counterclaim" rules, where none were involved. Nothing but an insignificant "cross-claim" was involved in the controversy in State Court where the three insurance companies settled a small property damage claim on the Cole automobile and third party Cole is not and never has been a party to the primary suit.

Respondents say that the overruling of Petitioners' motion to dismiss by the Trial Court was proper. The Federal Jury awarded close to $18,000.00 for serious personal injuries to Respondents, all of which injuries these Petitioners and their attorneys were well aware of when they made their unsuccessful bid to wipe out Respondents' claim for personal injuries and property damages by attempting to induce both the trial court and the Court of Appeals to condone their gross attempt to steal a base on a foul ball in the property damage action only, had in State Court.

The Trial Court, in effect, merely ruled that Petitioners would not be permitted to steal all four bases in State Court for a home run, because they did not have a legal right to be on first base on an illegal foul ball in the first place.

REASONS FOR DENYING JURISDICTION

Respondents respectfully point out that the Honorable United States Supreme Court should dismiss this Petition for Writ of Certiorari for want of jurisdiction, or, in the alternative, refuse same for the following reasons:

1. There is no Constitutional question to be decided in this appeal, and alternatively, even had there been one involved, Petitioners totally failed to assign as error either in the Trial Court, or the Circuit Court of Appeals any alleged violation of the Fifth Amendment to the Constitution of the United States. Neither was this question dealt with by the Circuit Court of Appeals.

2. The assertions or allegations set out in Petition for Certiorari are totally absent any question of any substantial public importance or peculiar gravity, and do not

present for review any important or difficult questions of federal-state relations.

3. The assertions or allegations set out in Petition for Certiorari do not involve or call for resolving diversities or conflicts occurring among the courts of the different Federal Districts and or among the U. S. Courts of Appeal, or resulting from any type of concurrent State or Federal Jurisdiction.

REASONS FOR DENYING WRIT

I.

The United States District Court and Court of Appeals did not fail to give full faith and credit to the prior state court judgment, which was for property damages only by a third party never a party to the present suit, which judgment was not, and could not have been res adjudicata to the claims for personal injuries awarded and allowed respondents by both the Trial Court and the Court of Appeals.

II.

Respondents never elected to assert a cause of action in the state court for negligence against petitioners, because a property damage claim only was brought by a third and unrelated party against both respondents and petitioners in state court as co-defendants only, which claim was settled by and between the respective insurance companies and the third party, without the knowledge or consent of respondents. This was done and the judgment distinctly recited "without prejudice" to the rights of respondents to bring their primary claim for damages for personal injuries against petitioners. Hence it did not constitute a withholding of elements of the previous state court action for later independent adjudication in federal court as alleged by these petitioners.

III.

The separate actions and role of the insurance carriers for both respondents and petitioners, together with the separate legal counsel for both insurance companies, who settled without respondents' knowledge or consent a small property damage claim by agreed state court order of dismissal, which was originally brought by an independent and separate third party was not res adjudicata as to these respondents, and did not bar the separate and independent claim for personal injuries that has been asserted in federal court.

Respondents have no quarrel with the rules and cases cited out of context in connection with their assertion that the United States Court of Appeals failed to give full faith and credit to the prior state court judgment which awarded a small amount of property damage to a third party as against both respondents and petitioners as co-defendants in the insurance "cross-action" brought and closed out in the State Court, because there was nothing contained in the State Court Judgment, precluding Respondents from bringing their primary suit for damages for personal injuries and negligence against the Petitioners in a Federal Court action.

The Court of Appeals could not possibly give full faith and credit to something that allowed absolutely no credit to Respondents in the first place. Neither did Petitioners even raise or assert this alleged violation of their constitutional rights in either the Federal Trial Court or Court of Appeals. Therefore, they should not be permitted to raise same for the first time in this Honorable Court.

Petitioners are in effect saying in spite of all the above, the Court of Appeals should have inserted and read into the State Court order of dismissal a mandate for both new Texas State law plus a new federal hold-

ing, ruling that an optional "permissive cross-claim" should be binding on all parties as a "compulsory counterclaim". Such was never the law or rules under either Federal Rule 97 (a), and Texas Civil Procedure Rule 13 (a).

Petitioners cited and quoted very sparingly from the Texas Supreme Court case of *Ogletree* v. *Crates,* 363 S.W. 2d 431 (1963), allegedly for the proposition that "the rule of res adjudicata in Texas bars litigation of all issues connected with a cause of action, which might have been tried in the former trial". This case involved an attempt by a mother to regain custody of minor child awarded to father in previous Alabama judgment on grounds of changed conditions, in order to secure a change of custody. There was no question of "permissive cross-claims" or "compulsory counterclaim" involved in this suit.

The Court merely ruled that the same facts considered in the Texas custody squabble were considered by the Alabama Court, and there was no point in permitting a change without any change of facts.

The Texas intermediate Court of Appeals case of *Lacy* v. *Carson Manor Hotel,* 297 S.W. 2d 367, cited but not quoted by Petitioners on their allegation of violation of the full faith and credit clause of U. S. Constitution, is neither in point nor applicable. In that case it was held that the two year statute is applicable to a suit merely for damages arising from a written contract induced by fraud, which conclusion they said rendered it unnecessary to consider the res adjudicata question in connection with compulsory counterclaims, etc.

Therefore, when it is all summed up, the adversary parties here, were co-defendants in the State court prop-

erty damage claim brought through a separate third party, on behalf of his insurance carrier, and did not present any type claim against each other, except to ask for indemnity as against each other, in case either or both got stuck on the third parties' property damage insurance claim.

Neither does the fact that the insurance companies and their counsel entered an agreed judgment dividing up the spoils on the third parties' property damage claims cut any ice regarding any "full faith and credit" question.

Petitioners refer to the "scanty opinion" of the Court of Appeals, because it did not cite any cases in support of its position. Petitioners admitted there were none. This admission at page 13 of their Petition, would appear to conclusively show (1) there is no constitutional question to be decided; (2) that the questions asserted by Petitioners are totally absent any question of substantial public importance; and, (3) there is no conflict between other federal Districts, which completely obviates any grounds for allowing their Petition for a writ, for the reasons they try to set out.

In the prior State Court proceeding, suit was instituted by Plaintiff Cole against the primary defendants and Petitioners and also Respondents as co-defendants for property damages *only* to a parked vehicle sustained by Cole and his motor company and his insurance carrier. Insurance counsel for both Petitioners and Respondents answered Plaintiff Cole's Petition and then filed a permissive "cross-claim" against each other for indemnity or contribution, on the property damages only.

Petitioners now contend that based upon their attempt to field a foul ball, they are now entitled to a home run by alleging that the filing of the "cross-claim"

required Respondents to submit and allege their primary claim against Petitioners for their known serious personal injuries and property damages, as a "compulsory counter-claim".

By virtue of the State and Federal Rules of Civil Procedure, a cross-claim for indemnity or contribution may be filed against a co-party. Rule 97 (e), Texas Rules of Civil Procedure, states:

> "*Cross-Claim against Co-Party.* A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim *may* include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

Rule 13 (g), Federal Rules of Civil Procedure, also allows a co-party to file a cross-claim for indemnity or contribution as follows:

> (g) Cross-Claim against Co-Party. A pleading *may* state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or *may* be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

It has always been Respondents' contention that the filing of cross-claims for indemnity or contribution, under either the State or Federal Rule provisions stated above, as co-parties in the prior state action for property damages only to Cole's automobile, did not operate and make Respondents' independent claim for personal in-

juries and property damages, a compulsory counterclaim in the prior state proceedings, which was settled by counsel for all of the insurance companies without consent or knowledge by Respondents. Both Federal Rule 13, and Texas Rule 97, have separate provisions as to compulsory counterclaims. Counterclaims are to be asserted against opposing parties. Federal Rule 13 (a) states as follows:

> "(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim within the jurisdiction of the Court, not the subject of a pending action, which at the time of filing the pleading the pleader has against an opposing party, if it arises out of the transaction or occurrence that is the subject matter of the *opposing party's* claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

As stated, compulsory counterclaims are to be filed against an *opposing party*. Respondents and Petitioners were not "opposing parties" in the prior state action for Cole's property damage only claim, as intended by the State and Federal Rules of Civil Procedure.

The distinction between a cross-claim and compulsory counterclaim is the parties involved. There is a definite and clear distinction between a cross-claim and counterclaim, and such distinction is of utmost importance. The Honorable Trial Court noted and observed the distinction when overruling Appellants' Motion to Dismiss.

> "Under Federal Rule 13, a counterclaim is a claim against an opposing party, while a cross-claim is against a co-party." Wright, Federal Courts, C. 10, § 80, Cross-Claims, at p. 306.

Stated in a similar way:

> "Cross-claims are litigated by parties on the same side of the main litigation while counterclaims are litigated between the opposing parties to the principal action. A failure to mark this distinction has resulted in some decisions treating counterclaims as cross-claims and even defining a cross-claim in terms equally applicable to a counterclaim." Barron and Holtzoff (Wright ed.), Federal Practice and Procedure, *Vol. 1A, C. 7, §397, cross-claims, at p. 598.*

Therefore, the actions filed between Petitioners and Respondents in the State Court proceedings were cross-claims, *not* counterclaims. Any other claims against each other, as co-defendants, would necessarily have to be cross-claims in the first instance. Neither the State nor Federal Rules of Civil Procedure provide for compulsory cross-claims, and this is basically what petitioners' allegations are.

Respondents did not elect to file a cross-claim against Petitioners in the state proceeding for their personal injuries and property damages as a result of the collision. Because of Respondents' election not to file their claim for personal injuries and property damages against Petitioners as a cross-claim in the lower court, their independent claim could not and is not now barred by the doctrine of res adjudicata, and is and was properly within the jurisdiction of the Federal Trial Court, as ruled by the United Court of Appeals.

> "Cross-Claims are not compulsory; it is discretionary with the party whether to assert his claim as a cross-claim or to reserve it for later independent litigation." *Barron and Holtzoff (Wright ed.), Federal Practice and Procedure, C. 7, § 397, Cross-Claims, at p. 599. Amer. Cur. Co. of N. Y. v. Fazel,* D.C. Iowa, 1956, 20 F.R.D. 110.

> "Even though the test for cross-claim is similar to that for a compulsory counterclaim, it is always discretionary with a party to assert his claim as a cross-claim or to reserve it for later independent litigation." *See Wright, Federal Courts, C. 10, § 80, Cross-Claims, 305-307, at p. 306.*

Since cross-claims are not compulsory, Respondents were not compelled to assert their independent claim against Petitioners in the State proceedings. It was discretionary with Respondents, and they used their discretion and asserted their claim against Petitioners in the Federal Court.

Petitioners further allege that they and Respondents were opposing parties in the State proceedings. Some idea of who are "opposing parties" can be seen in *Barron and Holtzoff (Wright ed.), C. 7, § 398, Opposing Parties, pp. 605-609.* However, references therein are to a primary plaintiff and primary defendant in different capacities. However, in *C. 7, § 397, Cross-Claims, at p. 598, it is stated:*

> "Cross-claims are litigated by parties on the same side of the main litigation, while counterclaims are litigated between the opposing parties to the principal action."

Respondents and Petitioners were not opposing parties to the principal action, and filing of cross-claims did not then make them opposing parties as intended by the rule.

No authorities or cases were cited by Petitioners in the United States Court of Appeals, and Respondents were unable to find any, wherein a cross-claim between co-defendants, not asserted in a prior proceeding, was held to be a compulsory counterclaim under either *Rule 97,*

Texas Rules Civil Procedure, or *Rule 13, Federal Rules of Civil Procedure.*

Actually, none of the cases and authorities quoted, illustrates Respondents' contention that this was a compulsory counterclaim under either Rule 97, Texas Rules Civil Procedure or Rule 13, Federal Rules Civil Procedure. On the contrary, each case and authority illustrates Respondents' contention that the compulsory counterclaim rule applies only to and between the primary Plaintiff(s) and Defendant(s) in the principal action.

Respondents and Petitioners were not primary Plaintiff(s) and Defendant(s) in the state proceeding. Further, each case cited by Petitioners involved a prior suit between a primary Plaintiff and Defendant, and subsequently the prior Defendant institutes a suit against the prior Plaintiff involving the same transaction. Again, the cases and authorities support Respondents' contention that the "compulsory counterclaim" applies to the primary Plaintiffs and Defendants (opposing parties) in the primary action. These are not the facts in the instant case.

Respondents acknowledge that any claim against Plaintiff Cole in the State Court involving the same transaction would have been a compulsory counterclaim as to Cole. However, Respondents have not asserted any claim against Cole in the State Court in the instant suit in either State or Federal Court.

Respondents have no quarrel with the four required conditions making a counterclaim compulsory under either the State or Federal Rules of Civil Procedure, namely:

1. It must arise "out of the transaction or occurrence that is the subject matter of the opposing parties' claim";

2. It must be matured and owned by the pleader at the time he served his pleading;

3. It must not require for its adjudication the presence of third parties of whom the court cannot achieve personal jurisdiction; and

4. It must not have been, at the time the original action was commenced, the subject matter of another pending action.

These are conditions which, if present, make a "counterclaim" compulsory between the *opposing parties* to the principal action. Similar conditions are necessary in cross-claims, but again, an important distinction must be made. Cross-claims may be filed by co-parties, since it is discretionary with the party asserting the claim to plead it or not. However, as between opposing parties to the principal action, if the conditions are present, a counterclaim is compulsory and shall be asserted.

Therefore, whether the conditions are present or not, is only important to a co-party who may want to assert a cross-claim in a proceeding. If the co-party desires not to file his claim as a cross-claim, the presence of the conditions is absolutely of no importance. Further, it will not bar his claim from later litigation.

> "The requirements of a compulsory counterclaim are similar to the requirements of a cross-claim except as to the parties to each." *Barron and Holtzoff (Wright ed.), Federal Practice and Procedure, C. 7, Cross-Claims, at p. 599.*

This is exactly what happened in the State proceedings below. If the conditions necessary to make a coun-

terclaim compulsory under Rule 97 (a), Texas Rules Civil Procedure and Rule 13 (a), Federal Rules Civil Procedure, were present, this merely means that Respondents may have asserted their claim for personal injuries and property damage against Petitioners as a cross-claim. However, Respondents chose, in their discretion, to preserve their valid claim against Petitioners for later litigation, which is allowed by both Texas Rule 97 and Federal Rule 13.

Respondents did not split their cause of action, and fragmentation of a single cause did not result. Respondents acknowledge that the majority rule is that a single wrongful or negligent act or omission causing an injury to both the person and property of the same individual constitutes but one cause of action, and the cause of action cannot be split, and a recovery or a judgment for either item of damage may be pleaded in bar of an action to recover for the other item of damage. *Cormier* v. *Highway Trucking Co., et al.*, 312 S.W. 2d 406 (Tex. Civ. App.); *Garrett* v. *Matthews*, 343 S.W. 2d 289 (Tex. Civ. App.); *Traders & General Insurance Co.* v. *Richardson*, 387 S.W. 2d 478 (Tex. Civ. App., err. ref.).

However, in the instant case, Respondents never split their single cause of action for injuries and property damages against Petitioners. Respondents asserted their single cause of action for injuries and property damages for the first time in Federal Court, which was proper, and a jury returned a verdict in favor of Respondents. At no time previously thereto had Respondents in any manner split or fragmented their single cause of action against Petitioners. Respondents preserved their claim using their permissible discretion as allowed under Rule 97 (e), Texas Rules Civil Procedure and Rule 13 (g), Federal

Rules Civil Procedure, for subsequent litigation in the Federal Court. Therefore, Petitioners' Petition for Writ of Certiorari should be denied and their previous motion to dismiss was properly overruled by the Federal Trial Court and the United States Court of Appeals, both of whom properly held that the rules forbid a home run on a foul ball.

Plaintiffs below herein were and are residents of California and were insured, in regard to the automobile collision, with Liberty Mutual Insurance Company. After being served in California with the pleadings involving Cole's property only damage in the Texas proceedings, Plaintiffs below notified their insurance company in San Jose, California. Thereafter, Plaintiffs below were never notified or informed of any proceedings had in State Court until after the judgment of dismissal was entered in the State action, and not until these Petitioners attempted a home run on a foul ball by filing their Motion to Dismiss in Federal Court.

Plaintiffs below did not consent or have knowledge of any of the pleadings filed in the State action. Further, Plaintiffs below were not notified of any hearings nor were they present at any hearings in the State action. The insurance company for Respondents, by and through their attorney, filed all pleadings in the State action in the name of Plaintiffs below. The insurance company further entered into and consented to judgment of dismissal in the name of Plaintiffs below. All of the above was instituted by Respondents' insurance company or its representatives without Respondents' knowledge or consent. (R. pp. 13-20).

Similar to the facts and circumstances above is *U.S.A.C. Transport, Inc., et al.* v. *Corley*, 202 F. 2d 8, wherein a

truck collided with an automobile driven by Corley. Suit was instituted against Corley. No one with the insurance company discussed with Corley the case against the transport company. The Fifth Circuit of the United States Court of Appeals found the insurer alone (insurance company) procured and executed the settlement and after determining the Georgia State Law, entered judgment in favor of Corley.

The applicable State law in Texas is the same as that of Georgia. The general rule is:

> "A compromise and settlement by an insurer without the knowledge of the insured does not bar an action by the insured against a third party. In such a case the insurer is acting for itself and not as agent for the insured and its settlement with the third party is not evidence against the insured." *32 Texas Jurisprudence 2d, §453, at p. 682.*

In *Wieding* v. *Krisch,* 271 S.W. 2d 458, the driver of Krisch's automobile collided with the vehicle of Wieding. Krisch filed suit for damages and Wieding filed an answer saying he received $1,000.00 from representatives of Krisch and had executed a release to her. Wieding alleged that in receiving the $1,000.00 for his claim against her, she should be forbidden to assert that he was at fault. The court correctly found that where a settlement of a claim against insured, for injuries suffered, had been made by automobile liability insurer without insured's knowledge or consent, it did not bar insured's action against Defendant for damages incurred in the collision.

Likewise stated in the Court in *Hurley* v. *McMillan,* 268 S.W. 2d 229:

> "It is manifest that an insurance company, if it admits that its insured is liable without its insured's knowledge or consent, is acting in its own interest,

> and not as the agent of the insured. The insurer cannot bar the insured's right to recover $24,000.00 damages for injuries received in the collision, by settling the claim of the other party to the collision for $1,325.00." *"City Transportation Co. of Dallas* v. *Vastures,* 278 S.W. 2d 373, 375; *Jackson* v. *Clark,* 351 S.W. 2d 292."

The Texas holdings are similar to courts of sister states. In *32 A.L.R. 2d 937,* the rule was stated:

> "The Courts which have considered the question are agreed that a liability insurer's settlement of a claim against the insured, made without the insured's consent or against his protests of non-liability, and not thereafter ratified by him will not ordinarily bar an action by the insured against the person receiving the settlement on a claim arising out of the same state of facts."

The instant case is similar to those cited. In the prior State action the Plaintiff Cole instituted suit for $1,600.00 property damages. Respondents herein had an independent claim against Petitioners and a right to recover $65,000.00 for personal injuries. Respondents' insurance company entered into the judgment of dismissal with State Plaintiff Cole without the knowledge or consent of Respondents. Therefore, the settlement and agreement for an insignificant sum of property damages to Cole's automobile only, certainly should not, and could not (as found by both the trial court and U. S. Court of Appeals), bar claim for substantial personal injury damages received in the collision.

It is Respondents' contention that the State Court was aware of the holdings, facts and circumstances stated above and therefore entered a judgment of dismissal "without prejudice," and therefore not upon the merits as to Respondents' independent cause of action. A judgment of dismissal not upon the merits in a State Court,

is no bar to an original action for personal injury and property damages in a Federal Court. *Harrison* v. *Remington Papers Company*, 140 Fed. 385, 199 U.S. 607, 50 L. Ed. 331.

Since the judgment of dismissal was made without the consent or knowledge of Respondents and would not bar a subsequent action by Plaintiffs in the State Court, the Federal Court can and did properly entertain the new action of Respondents.

It is to be further noted that the words "with prejudice" were expressly stated in the State judgment of dismissal as to State Plaintiff Cole's cause of action against Respondents, and Petitioners. The words "with prejudice" were intentionally omitted as to Plaintiffs' or Respondents' cross-action indicating that the State Court did not intend to dispose of Respondents' independent action. This would allow the Respondents to pursue their independent claim and choose their own forum of trial.

Under Texas Law, home runs are not permitted on a foul ball, and one having a legal right and choice of cause of action should be able to try it in his own way, and not have some method not of his own choosing thrust on him by his adversary. *Angle* v. *Shinholt, et al.*, 90 F. 2d 294. To allow Respondents to pursue their independent claim in a forum of their own choice would be in conformity with the cases stating a Plaintiff has the privilege of election to choose a forum of trial unless the law requires he surrender that right and litigate his cause of action in a forum chosen by his adversary. *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, 199 U.S. 607.

As mentioned above, if Plaintiffs' independent claim was a "compulsory counterclaim" in the prior State action, then his adversary, Defendant herein, was not allowed to choose the forum. On the contrary, a forum

was chosen by State Plaintiff Cole who has no interest in the independent claim of Respondents, and who is not an adversary in the present proceedings.

Respondents allege that such a result was not the intention of either Rule 97 (a), Texas Rules of Civil Procedure, or Rule 13 (a) of the Federal Rules of Civil Procedure. A more equitable result would be that Rule 97 (e) and Rule 13 (g) allows a co-party in a prior suit to file a "permissive cross-action" without them being considered as opposing parties under Rule 97 (a) and Rule 13 (a) of the Respective Rules of Civil Procedure. Therefore, he would not have to submit his independent claim against the co-party as a compulsory counterclaim.

SUMMARY AND CONCLUSION

Respondents' claim for personal injury and property damage was not a compulsory counterclaim in the prior state proceeding under either Rule 97, *Texas Rules of Civil Procedure* or Rule 13, *Federal Rules of Civil Procedure*. Respondents could assert a "cross-claim" of indemnity or contribution under the respective Rules of Civil Procedure. in the third party's property damage claim against Respondents and Petitioners as co-defendants, however, their independent claim for personal injury and property damage against Petitioners was discretionary with Respondents as to whether or not to assert the same as a "cross-claim" in the State proceeding or to preserve it for later litigation. Respondents chose not to assert the independent claim as a "cross-claim" in the State proceeding, but to preserve it for later litigation in Federal Court.

Respondents and Petitioners were not "opposing parties" in the State proceeding, as intended by the rules, and therefore Respondents' independent claim was not a

"compulsory counterclaim" in the State proceeding. Petitioners would like to change the rules and make it so. The impartial umpire in the Trial Court and the United States Court of Appeals correctly ruled it a foul ball.

Respondents' single cause of action for personal injury and property damage against Petitioners was not fragmented or split by the State proceeding. Respondents asserted their claims for personal injury and property damages as one cause and in one suit in Federal Court. Nothing but third-party Cole's property damage and the respective rights of three insurance companies concerning same were ever adjudicated in the abortive State court case. In no sense of the term can it be said that a fragmentation or splitting of a single cause of action of personal injuries and property damages of the Respondents Bleisch resulted by the prior State proceeding, since neither Respondents' injuries or damages were in issue, and there was no judgment entered as to either personal injury or property damages of Respondents. Therefore, Respondents correctly had the right to assert this single cause of action in the Federal Court.

In the alternative, the Judgment of Dismissal in the State Court is not res adjudicata and does not bar an action by the Respondents against Petitioners in the Federal Court, since under Texas holdings, settlement in State Court by respective insurers of a minor property damage claim of a stranger without knowledge of Respondents does not prevent the later assertion of the claim.

In the instant case, all pleadings and settlements were made in the State proceedings, without the knowledge or consent of Respondents. Further, Respondents were not notified of any hearing on the settlements made, nor were they present at any such hearing. Further, the

judgment of dismissal as to indemnity or contribution between Respondents and Petitioners, as co-defendants intentionally omitted the words "with prejudice." The words "with prejudice" were intentionally inserted as to the dismissal between State Plaintiff third-party Cole and Co-Defendants, Respondents and Petitioners.

Any other holding would deprive these Respondents from choosing their own forum for litigation of their independent claim of personal injuries and property damage against Petitioners. Further, the forum would have been chosen by a party who has no interest whatsoever in the litigation between Respondents and Petitioners. Therefore, the Trial Court which was affirmed by the United States Court of Appeals, was eminently correct in overruling Petitioners' Motion for Dismissal, and correctly ruled that they could not win a complete ball game by virtue of trying to garner home runs on a bunch of self-evident foul balls and poor fielding efforts.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondents respectfully pray that the Petition for Writ of Certiorari be denied, and/or dismissed for want of jurisdiction, thereby upholding the United States Court of Appeals opinion of affirmance per curiam of the correct verdict and judgment of the trial court.

Respectfully submitted,

By .....
JOHNNY SPLAWN

Of Counsel:

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Lubbock, Texas

CERTIFICATE

Copies of the above and foregoing brief have been mailed, postage prepaid, to the attorneys of record for Petitioners herein, Stubbeman, McRae, Sealy & Laughlin, P. O. Box 670, Midland, Texas; and Strasburger, Price, Kelton, Martin & Unis, Dallas, Texas, on this the 13th day of January, A.D., 1969

.....

JOHNNY SPLAWN

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25647

HAL HALL AND SNOW BLACKBURN HALL,
Appellants,

vs.

PAUL J. BLEISCH, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(September 30, 1968)

Before Bell and Simpson, Circuit Judges
and Roberts, District Judge

PER CURIAM: The parties to this appeal were involved in a three car accident. The owner of the third car sued them in State court to recover property damages. They cross-claimed, one as against the other, for indemnity as to the third party's property damage. The case was set-

tled by a consent judgment in the State court. Appellees then brought suit in the Federal court against the Halls, seeking damages for personal injuries.

The District court did not err in rejecting the defense based on res adjudicata The issue presented in the federal suit was not in issue in the State court litigation which appellant asserts as having given rise to the bar, nor is it such an issue as would require the application of res adjudicata under Texas law. The case of Ogletree v. Crates, 363 S.W. 2d 431 (Tex. S.Ct. 1963) relied on by the appellants, extends only to requiring the assertion of all defense that a defendant might have against a plaintiff. We do not read it to require the assertion of possible cross-claims by co-defendants.

There is likewise no merit in the contention that the suit is barred by the failure of appellees to comply with the Texas Compulsory counterclaim rule in the State Court litigation. The claims asserted were crossclaims and not counterclaims. Rule 97, Texas Rules of Civil Procedure; Rule 13, Federal Rules of Civil Procedure; and Wright, Federal Courts, p. 306 (1963).

AFFIRMED.